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Nos. 86-1877, 86-1901

In The
Supreme Court of the United States
October Term, 1986

CHARLES F. FOGERTY, *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

TAHOE SHOREZONE REPRESENTATION,
Petitioner,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state, having relinquished its fee title to the beds of non-tidal, navigable waters between low and high water, is prohibited by the United States Constitution from retaining a public trust interest therein.

2. Whether a substantial federal question is presented by a state court decision setting the high water mark on a navigable lake based on the lake's long-established current levels rather than some earlier, pre-regulated elevation.

3. Whether a state court's determination of high water mark on a navigable lake violates any federally-established rights of littoral owners in the absence of a showing that they have been denied any uses of the affected lands.

PARTIES

We concur with petitioners' enumeration of parties with one exception: The California Department of Fish and Game is not a party to this action.

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JURISDICTION

Petitioners in these cases seek to invoke this Court's jurisdiction under 28 United States Code section 1257(3) (1982). This Court lacks jurisdiction for at least two basic reasons.

1. Assuming petitioners' claims that the decisions of the courts below could give rise to an uncompensated "taking" in violation of the Constitution, California has not rendered a final determination of petitioners' rights that can give rise to a ripe taking claim under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, *MacDonald, Sommer & Frates v. Yolo County* 106 S.Ct. 2561 (1986), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 2378 (1987).

2. Pursuant to *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the Court of Appeal decision at issue merely applies state property law relating to the extent of public and private interests in California's navigable waters and their underlying beds, and thus does not present a substantial federal question. (See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal provision of the Constitution at issue is article III, section 2, clause 1, which provides in part:

> "The judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies. . . ."

The principal federal statutory provision at issue in this case is 28 United States Code section 1257 (1982), which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ."

Also relevant is California Constitution article X, section 4 (1986), enacted in 1879 as article XV, section 2, prior to issuance of several of the grants in the instant cases, which in pertinent part provides:

> "No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

STATEMENT OF THE CASE

These cases arise out of disputes over interests of the public, and private shoreowners, involving California's largest lake, Lake Tahoe. Originally, the parties saw the matters as winner-take-all boundary disputes. California, invoking her sovereign title to the beds of navigable, non-tidal lakes and rivers, claimed a high-water boundary, and full ownership rights up to that line. The shoreowners, petitioners herein, claimed the State did not have what it claimed because, among other reasons, California Civil Code section 830, passed in 1872, relinquished the State's interest between high and low-water. Both sides have lost on these broad claims. The California court held that the State's title to lands between high and low water had been given up, but that a public trust interest had been retained. Petitioners here attack the validity of the public trust doctrine on its face. This Court is asked to aid the

shoreowners in their battle to overturn the Supreme Court of California's balanced and middle path, one which has never been applied specifically to petitioners; which draws for its authority upon common law precepts well within the realm of petitioners' expectations; and which, on its face, only prohibits petitioners from developing Lake Tahoe however they please.

1. Lake Tahoe, California's largest lake, like all of California's navigable waters, has witnessed a crushing assault of development in recent years. (See *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 393, n. 2 (1979); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 638 F.Supp. 126, 128-129 (D. Nev. 1986), appeal docketed, No. 86-2266 (9th Cir. July 3, 1987).)

2. Petitioners are owners of littoral lands bordering the lake, and trace their title to federal grants, some made after the passage of what is now article X, section 4 of the California Constitution. Neither the petitions for certiorari, nor the record in general, disclose exactly what petitioners do with their lands, what they want to do with them, or what they need to do with them to sustain reasonable and profitable use. (But see this Court's rule 21.5 1986).) They believe generally, however, that California's retained "public trust" interest in littoral property overlaps and exceeds "reasonable land use planning through adoption of zoning laws under the police power" (petition at 9), regardless of the different nature of the doctrine and how unobtrusive it may be in a particular case.

3. In 1977, the Attorney General of California sought to establish that the State owned in full every property interest in the lands underlying Lake Tahoe up to the high water mark, based on claims to the beds of navigable,

non-tidal lakes and rivers held by California by reason of her sovereignty. After the petitioners sued under both state law and 42 United States Code section 1983 to block the State Land Commission's attempt to record such claims in the offices of county recorders throughout California, the Supreme Court of California rejected the State's claims.

In its companion decisions in *State v. Superior Court (Fogerty I)*, 29 Cal.3d 240, 247, 625 P.2d 256, 172 Cal. Rptr. 713, cert. den., 454 U.S. 865 (1981) (Petitioners' Appendix A-21) and *State v. Superior Court (Lyon)*, 29 Cal.3d 210, 625 P.2d 239, 172 Cal.Rptr. 696, cert. den., 454 U.S. 865 (1981) (Petitioners' Appendix A-35), the state court held that although California had received the beds of its navigable waters to the high-water mark on statehood in 1850, the enactment of California Civil Code section 830 in 1872 should, in light of subsequent construction, be viewed as destroying the State's fee title between high and low water. (See *Lyon, supra,* 29 Cal.3d at 225-226.) The Supreme Court of California made clear that before the State could interfere in any manner with "previously constructed docks, piers and other structures in the shorezone" (*Fogerty I, supra,* 29 Cal.3d at 249), full and adequate compensation must be paid under both state and federal law.

4. At the same time, that court ruled that Civil Code section 830 showed no intent on the part of the Legislature, with respect to lands between low and high-water, to abrogate "the trust described in *City of Berkeley v. Superior Court,* 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. den., 449 U.S. 840 (1980)." (*Lyon, supra,* 29 Cal.3d at 226.) *City of Berkeley* relied on a long line of California decisions, e.g., *People v. California Fish Co.,* 166 Cal. 576,

138 P. 79 (1913), which in turn found persuasive support in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892).

5. The *Lyon* and *Fogerty I* decisions, from which these cases arise, reaffirm "that these plaintiffs [along Lake Tahoe's shore] may use the shorezone for any purposes which are not incompatible with the public trust" (*Fogerty I, supra,* 29 Cal.3d at 249 (citing *City of Berkeley*)), never stating whether *any* purpose petitioners in fact entertain was barred under state law. And prior California case law, not in any way limited by *Fogerty I,* recognized many uses compatible with the trust interest, including mineral exploration (*Boone v. Kingsbury,* 206 Cal. 148, 273 P. 797 (1928), appeal dism. and cert. den., 280 U.S. 517 (1929)), and the construction of additional docks, wharves, motels, restaurants, shopping complexes, and, even, parking lots. (*Martin v. Smith,* 184 Cal.App.2d 571, 7 Cal.Rptr. 725 (1960).) Petitioners sought certiorari. This Court denied review. (*Lyon v. California,* 454 U.S. 865 (1981).)

6. To determine the high-water mark for Lake Tahoe, and hence the potential reach of the public trust doctrine, the Supreme Court of California was required to decide between petitioners' claim for "the 'last natural' water mark of the lake," and the State's claim that "the boundary should be fixed by assessing the lake in its current condition." (*Fogerty I, supra,* 29 Cal.3d at 247-248.) The state court adopted the "current level" test, noting that petitioners' expectation interests in the "natural" level had been eroded over a period of a century by the dam in the Truckee River, into which Lake Tahoe empties, now ad-

ministered by the United States pursuant to the Newlands Reclamation Project. (See *Nevada v. United States,* 463 U.S. 110 (1983).)

7. The Court of Appeal decision of which petitioners complain (*Fogerty v. State,* 187 Cal.App.3d 224, 231 Cal. Rptr. 810 (Cal. App. 1986) (*Fogerty II*) (Petitioners' Appendix A-1) simply implements the 1981 California Supreme Court ruling with respect to fixing the high-water mark, without passing on any of the uses that may be "incompatible with the public trust." The Court of Appeal declared the high-water mark to be located at the highest elevation actually reached by the lake in five sequential years, the period required for the acquisition of prescriptive rights in California. Other than the fixing of this upper boundary at 6,228.75 feet above sea level, nothing has changed since this Court denied review in 1981. No actions for injunctive relief have been brought by the Attorney General, or anyone else; motorboats still pull up to the docks at Lake Tahoe; private residents, so far as the record discloses, still exclude the public generally from their property by the usual signs, fences, hedges, and lawsuits for trespass and ejectment. Consistent with planning schemes administered by local government and the bi-state regional planning agency, as well as regulation of the U.S. Army Corps of Engineers, land use in the shorezone continues unaffected by these decisions.

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REASONS FOR DENYING THE WRIT

INTRODUCTION

Comparison of the record in this case with the factors that counsel plenary review under the certiorari jurisdiction show that this case is completely unworthy of this Court's limited resources. Even assuming that petitioners' theory of "judicial takings" may have merit in "extreme case[s]" (Petition at 16), no such "dramatic result" (*id.*) is at issue here. All the Supreme Court of California has done is tentatively recognize that lands below the current high-water mark in Lake Tahoe are *potentially* subject to judicially-fashioned trust interests, all of which may be curtailed or adapted to dovetail with private needs (and even wants). Unless this Court is ready to abandon its well-entrenched rules against consideration of broad facial challenges under the Takings Clause (rules which have been reiterated every term since review was last denied), or desires to overrule its considered opinion in *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, there is no proper federal question on this record. Either the petition must be dismissed for want of a final judgment, per *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621 (1981), or the writ should be denied under the reasoning of *MacDonald, Sommer & Frates v. Yolo County, supra,* 106 S.Ct. 2561.

Because petitioners are essentially challenging the public trust doctrine on its face, they confront an "uphill battle" on an "especially steep" slope. (*Keystone Bituminous Coal Ass'n v. DeBenedictis,* 107 S.Ct. 1232, 1247 (1987).) In such cases, this Court "properly refuses to look into the possibility that harsh results [will occur]." (*Connally v. Pension Benefit Guaranty Corp.,* 106 S.Ct.

1018, 1032 (1986) (O'Connor, J., concurring).) As this Court noted this past term, "[a] facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." (*United States v. Salerno,* 107 S.Ct. 2095, 2100 (1987).) Petitioners gain nothing by pointing out that trust interests may be implicated in over 4,000 miles of California shorezone. To use this case as a vehicle for aborting state court processes yet to be had with respect to thousands of parcels is just one more factor counseling against review. As in *Moore v. Sims,* 442 U.S. 415 (1979), here "the broader the challenge, the more evident [petitioners' ripeness problem] becomes." (*Id.,* at 428.)

Nor should it be of any concern to this Court that the instant judgment would be final if, for example, petitioners complained of a breach of procedural due process during the appellate process (*cf. Evitts v. Lucey,* 469 U.S. 387, 393 (1985)), instead of a violation of the Takings Clause arising out of the substantive decisions of the California courts. For this court has long recognized that when "further proceedings are necessary to resolve the federal question whether there has been a taking at all," this Court has no jurisdiction under 28 United States Code section 1257 (1982). (*San Diego Gas & Elec. v. San Diego, supra,* 450 U.S. at 633.) Likewise, when for purposes of its own procedure a state court has dismissed a taking claim without prejudice to its renewal following further proceedings under the finality rule, this court has treated such decisions as "final" for purposes of section 1257, but has affirmed on the ground that the answer to whether "property has been taken" is still unknown. (*MacDonald, supra,* 106 S.Ct. at 2568-2569.) These "normal delays" in litiga-

tion are simply not takings (*First English, supra,* 107 S.Ct. at 2389), and adjudication in this Court is thus precluded by "the very nature of the inquiry required by the Just Compensation Clause." (*Williamson County, supra,* 473 U.S. at 190.)

Here, California's courts, as is their right, have bifurcated the inquiry over the public trust interest in the Lake Tahoe shorezone. The first part of the litigation, recognizing that such an interest may be asserted, is over and is probably final for purposes of section 1257, just as the state court judgment in *MacDonald* was final. The second, and crucial part of the case, concerning whether and how the public trust will be applied, has yet to commence for the basic reason that no one has sought to invoke the trust. Petitioners have not been harmed any more than any landowner is harmed by the passage of a general zoning or regulatory law for which variances and exemptions can be obtained. Indeed, because no one has asserted a trust interest, petitioners are harmed a lot less. The suggestion that this Court's scarce resources are needed at this time to save petitioners from the Supreme Court of California is wholly fanciful. This case is in exactly the posture of the *MacDonald* and *Williamson County* cases as well as *United States v. Riverside Bayview Homes, Inc.,* 106 S.Ct. 455 (1986) and *Hodel v. Virginia Surface Mining and Reclamation Assn.,* 452 U.S. 264 (1981). It should for this reason be rejected for review, just as this Court has rejected similar claims that the courts of our sister states have unlawfully "taken" property by judicial decree. See *Ariyoshi v. Robinsion,* 106 S.Ct. 3269-3270, on remand, 796 F.2d 339 (9th Cir. 1986).

More fundamentally, petitioners' protests notwithstanding, granting review in this case would only plunge

this Court into a swamp that not even the most activist Justices of the *Lochner* era would have entered. No one disputes that state courts are subject to the strictures of the Fourteenth Amendment, but it would be astonishing if the rulings of the Supreme Court of California on matters as vital to California's sovereignty as the status of the beds underlying its navigable waters could provide "an appropriate vehicle for a needed declaration that the Constitution still protects real property against expropriation." (Petition at 17.) At worst, and giving our state courts *no* deference on matters of local property law, this case only reflects high-stakes litigation of the kind that often takes place in state courts, but which this Court, for many reasons, does not, and should not, review under article III and 28 United States Code section 1257(3).

1. THE STATES RECEIVED THE BEDS OF THEIR NAVIGABLE WATERS TO HIGH WATER MARK ON THEIR ADMISSION TO THE UNION. STATE LAW DETERMINES THE NATURE AND EXTENT TO WHICH THESE LANDS MAY BE SUBSEQUENTLY TRANFERRED

A. State Law Governs The Disposition Of Sovereign Lands

California acquired the beds of all her navigable waters on statehood under the constitutional equal footing doctrine. (*Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363.) It was clear early on that the navigable waters acquired by the states were all waters navigable in fact, and not merely tidal waters. (See *Packer v. Bird,* 137 U.S. 661, 670 (1891).) See also *Colberg v. State of California,* 67 Cal.2d 408, 423, 62 Cal. Rptr. 401, 432 P.2d 3 (1967), cert. den. 390 U.S. 949 (1968).

The initial landward boundary of these sovereign lands is fixed by federal law. (*Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363 at 376.) And that initial boundary, under federal law, is high water. (*Barney v. Keokuk,* 94 U.S. 324, 338 (1876); see Solicitor's Opinion, Department of Interior, 25 L.D. 510, 511 (1897); *Shively v. Bowlby,* 152 U.S. 1, 42-43 (1893); *Martin v. Waddell,* 41 U.S. (16 Pet) 367 (1842); *Pollard's Lessee v. Hagen,* 44 U.S. (3 How) 212 (1845); *Bowman's Devisees v. Wathen,* 2 McLean 382 (1842). The extent of public and private rights in a state's navigable waters, thereafter, is to be determined by state law. (*Barney v. Keokuk, supra,* 94 U.S. 324; *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363.) The established law in California, as in many other states (see Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L.Rev. 471 (1970); 1 Clark, Waters and Water Rights, § 36.4(A), pp. 196-197 (1967 ed.); Althaus, Public Trust Rights, U.S. Dept. of Interior (Nov. 3, 1978)), is to the effect that, absent clear and express indications of legislative intent, the courts will not construe a grant of sovereign lands as extinguishing the public easement for commerce, navigation and fisheries with which such lands are impressed. (E.g., *People v. California Fish Co., supra,* 166 Cal. 576; *Forestier v. Johnson,* 164 Cal. 24, 127 P. 156 (1912); *City of Oakland v. Oakland Water Front Co.,* 118 Cal. 160, 50 P. 277 1897).) Indeed, a State attorney general's opinion relied on by petitioners expressly states that all lands below navigable waters, whether tidal or non-tidal, are held in trust to the high-water mark. (43 Ops.Cal.Atty.Gen. 291, 294 (1964).) Accordingly, the ruling of the California Supreme Court that the 1872 Legislature had passed the State's fee title to riparian owners but had failed to terminate the

public trust interests to high-water in *Fogerty I* was wholly predictable and consistent with settled principles of state law.[1]

This rule is not peculiar to California. It was enunciated by the New Jersey court as early as 1821 in *Arnold v. Mundy*, 6 N.J.L. 1 (1821), and first recognized by this Court in *Martin v. Waddell, supra*, 41 U.S. (16 Pet) 367, 409-413. A thorough discussion of the principles underlying it was undertaken by this Court in *Illinois Central Railroad v. Illinois, supra*, 146 U.S. 387.[2] More recently the Supreme Court of Florida confirmed public rights to navigable waters irrespective of whether the beds have

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1. Indeed the court's ruling reflects a retraction of a state rule that was originally much more harsh. Early California cases held that grants of sovereign trust lands made without express legislative authorization were totally void. (E.g., *People v. Kerber*, 152 Cal. 731 (1908); *Kimball v. MacPherson*, 46 Cal. 103 (1873); *Taylor v. Underhill*, 40 Cal. 471 (1871).)

Later cases, represented by *People v. California Fish Co., supra*, 166 Cal. 576, construed such grants to be valid, but subject to a retained public trust interest. This was the holding in *Lyon* and *Fogerty I*.

2. Although *Illinois Central Railroad v. Illinois, supra*, 146 U.S. 387, described variously as the "lodestar" of public trust law (Sax, *supra*, at 489), and the "seminal case" in this field (*City of Berkeley v. Superior Court, supra*, 26 Cal.3d at 521), was approvingly cited in the *Lyon* decision for the proposition that state sovereign lands remain subject to the public trust (*State v. Superior Court (Lyon), supra*, 29 Cal.3d at 227), neither *Lyon* nor *Fogerty I* treats *Illinois Central* in any way other than what it is: an eloquent expression of the common law rule that state sovereign lands are impressed with a near-inalienable public trust, and that grants of such lands remain impressed with the public trust.

This construction makes it unnecessary to discuss petitioners' startling suggestion that the *Illinois Central* opinion was somehow reversed by *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. 363. (*Fogerty* petition, p. 11, n. 7.) *Illinois Central* may have been a pre-Erie decision, but nonetheless it applied Illinois law. (See *Appleby v. New York*, 271 U.S. 364 (1926).)

been transferred into private ownership. (*Coastal Petroleum Co. v. American Cyanamid Co.*, 492 S.2d 339 (1986), cert. den. sub nom. *Mobil Oil Corp. v. Board of Trustees*, 107 S.Ct. 950 (1987).)

Its application to nontidal, as well as tidal, navigable waters in California is beyond question. Long before the *Lyon* and *Fogerty I* decisions, the California court held in 1884, with reference to the Sacramento and American Rivers:

> "The State holds the absolute right to all navigable waters and the soils under them, subject, of course, to any rights in them which may have been surrendered to the general Government . . . The soil she holds as trustee of a public trust for the benefit of the people; and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it; these are inalienable." (*People v. Gold Run D & M Co.*, 66 Cal. 138, 151-152, 4 P. 1152, 1159 (1884).)

There is nothing unusual or unprecedented in a rule of state law that leaves public trust rights impressed on grants to private parties. For example, South Dakota and North Dakota both have statutes similar to California's Civil Code section 830. In both states, these provisions were held, as in California, to give a fee interest to upland owners down to low-water. Nevertheless, it was held that the statutes did not extinguish public trust rights:

> "While the title of the riparian owner on navigable or public waters extends to ordinary low-water mark, still his title is not absolute, except to ordinary high-water mark, and as to the intervening shore space between high and low water mark the title of the riparian owner is qualified or limited by and subject to the rights of the public." (*Anderson v. Ray*, 37 S.D. 17, 24, 156 N.W. 591, 595 (1916). Accord, *Flisrand v.*

Madison, 35 S.D. 457, 152 N.W. 796 (1915); *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937); *Sloan v. Biemiller*, 34 Ohio St. 492 (1878); *State v. Cleveland & Pittsburgh Railroad Co.*, 94 Ohio St. 61, 113 N.E. 677 (1916).)

In Montana, which has a similar statute, the rule is the same:

> "It is true that, while the abutting owner owns to the low water mark on navigable rivers, still the public have certain rights of navigation and fishery upon . . . the strip in question (between high and low water)." (*Gibson v. Kelly*, 15 Montana 417, 39 P. 517, 519 (1895).)

Other courts have also held that the trust attaches to lands between high and low-water when the sovereign bed extends only to low-water. (See, e.g., *Nedtweg v. Wallace*, 237 Mich. 14, 208 N.W. 51 (1926), affd. on rehearing, 211 N.W. 647 (1927); *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 85 N.W. 402 (1901); *Miller v. Lutheran Conference and Camp Association*, 331 Pa. 241, 200 A. 646 (1938); *Attorney General v. Revere Copper*, 152 Mass. 444, 25 N.E. 605 (1890).)

B. A Riparian Boundary Is Ambulatory. State Law Controls The Effects Of Accretion, Erosion, Reliction, And Submergence

The boundary between public and private interests on navigable waters is an ambulatory one, determined by state law. (*Hardin v. Jordan*, 140 U.S. 371, 382 (1891).) State law controls the nature of the fee acquired by upland owners, whether increased or diminished by the processes of accretion, erosion, reliction, avulsion or, as here, submergence. The title to land acquired by accretion or its counterpart, submergence, has long been held to be " . . . a title acquired under operation of the law of the State, which each State determines for itself." (*St. Louis v. Rutz*, 138

U.S. 226, 250 (1891); *Barney v. Keokuk,* 94 U.S. 324, 337 (1896).)

The owner of lakefront land, like the holder of a beach house (cf. *Matcha v. Mattox,* 711 S.W.2d 95 (Texas 1986) cert. den., 107 S.Ct. 1911 (1987)), may suffer from the effects of erosion or submergence, whether natural or artificial, and may benefit from accretion. Under the common law there is no distinction as to whether changes in water boundaries were artificially or naturally caused. (*County of St. Clair v. Lovingston,* 90 U.S. (23 Wall) 46 (1874).)

Here, the courts chose to apply these common law principles, and fix the high and low water marks at the actual, established levels of Lake Tahoe with which littoral owners have been living for many years.[3] (*Fogerty I, supra,* 29 Cal.3d at 247-249.) Its opinion is both well-founded in precedent and practical.

The petitioners' apparent contention that the States' sovereign boundaries on non-tidal waters extend to the ordinary high (or low) water mark of the waterway in its "last natural condition" has no support under traditional common law principles or under California's interpretation of the common law. Under common law, the general rule is that title to the land follows changes in the shoreline, regardless of whether those changes are naturally or artificially caused. (See *County of St. Clair v. Lovingston,*

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3. Indeed, when the artificial levels of the Lake were established in the 1930's, a higher level than the one in question was approved by a poll of property owners. (Defendants' Exh. II, CT 3150; 30 Ops.Cal.Atty.Gen. 262, 266.)

supra, 90 U.S. (23 Wall.) at 68.)[4] The courts also have long held, without reference to prescriptive rules governing upland boundary disputes, that long-established water levels give rise to property rights regardless of their cause. (*City of Los Angeles v. Aitken,* 10 Cal.App.2d 460 (1935); see also *Clement v. State Reclamation Board,* 35 Cal.2d 628 (1950); *Natural Soda Prod. Co. v. City of Los Angeles,* 23 Cal.2d 193 (1943), cert. den. 321 U.S. 793 (1944): *Chowchilla Farms, Inc. v. Martin,* 219 Cal. 1 (1933); *Wilbour v. Gallagher,* 462 P.2d 232 (Wn. 1969), cert. den. 450 U.S. 878 (1970); *Diana Shooting Club v. Lamoreaux,* 114 Wis. 44, 89 N.W. 880 (1902).)[5]

The prescriptive rationale further supports this. Thus the state's boundary continues to move landward when water levels rise as a result of a dam or like condition, causing "artificial submergence." In opinions characterized by petitioners as "one old case from Arkansas and

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4. There are a few exceptions to this general rule, none of which are applicable here. Under common law, the boundary does not shift where there has been a sudden and perceptible "avulsion" or, analogously, where a lakebed has been uncovered by intentional drainage, reclamation or diversions. (E.g., F. Clark, *The Law of Surveying and Boundaries,* § 572 (4th ed. 1976); Tiffany, *Law of Real Property,* § 1222 at 1083 (3d ed. 1939).) The state court's determination that these rules did not apply to this situation is conclusive here.

In addition, California Civil Code section 1014 limits an upland owner's right to accretions to those caused by natural forces only. (*Carpenter v. City of Santa Monica,* 63 Cal.App.2d 772, 787-788, 147 P.2d 964, 971-973 (1944).) Section 1014 is inapplicable here because the artificial raising of Lake Tahoe by means of a dam has resulted in submergence of upland—not an accretion. Again, the state court's interpretation of the meaning of California law is conclusive in this Court.

5. A federal appellate court recently applied this rule to hold the Corps of Engineers had acquired jurisdiction over the artificially submerged portions of Lake Pend Oreille. (*Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986).)

another from Iowa" (*Fogerty* petn., p. 14) the Arkansas and Iowa courts held that land submerged by the erection of a dam or levee system on a navigable lake becomes the property of the State, as "trustee for the public," by virtue of prescription. (*State v. Parker*, 200 S.W. 1014, 1015-1016 (Ark. 1917); *State v. Sorenson*, 271 N.W. 234, 238-239 (Iowa 1937); see also *Village of Pewaukee v. Savoy*, 79 N.W. 436, 437 (Wis. 1899); *Diana Shooting Club v. Lamoreaux, supra*, 89 N.W. at 884; Farnham, The Law of Waters and Water Rights, § 59, p. 272 (1904 ed.).) Petitioners' characterization of the considered opinions of the highest courts of these sovereign states does not do them justice. It does, however, recognize that is neither new nor novel to adopt a rule of property based on long-established water levels. Significantly, the *Parker* case revolved around a conflict over public trust uses—one between members of the public and members of The Five Lakes Outing Club, over use of some 1,000 acres inundated by a levee in 1905. Although the club retained ownership of the underlying bed of this lake, the court held that it could not exclude the public from the waters, because the state, as trustee for the public, had acquired title by prescription. (*Id.*, 200 S.W. at 1015.)[6]

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6. The *Parker* case similarly belies petitioners' contentions that prescriptive rights must arise only if the water levels are raised by the state. In *Parker*, the dam had been built by a local levee district, not the state. (*Ibid.*) California case law is directly consistent in this regard. In *Bohn v. Albertson*, 107 Cal.App.2d 738 (1951), Frank's Tract, formerly privately owned farmland, was inundated by a breach in a delta levee. Although the owner retained title to the bed, the court held that he had no power to exclude members of the public seeking entry by boat for public trust purposes—i.e., hunting and fishing. At most he retained power to reclaim the land within a reasonable time. (*Id.*, 107 Cal.App.2d at 749; see also *Forestier v. Johnson*,

(Continued on following page)

The Washington Supreme Court used much the same reasoning in *Wilbour v. Gallagher, supra,* 462 P.2d 232, cert. den. 400 U.S. 878. In that case, the court enjoined a fill placed on land periodically submerged by operation of a dam across the outlet of Lake Chelan. The land was held in fee by the defendants. Absent the raising of water levels by the dam, the defendants' land would have been permanently dry. The court ordered defendants to remove the fill since it obstructed navigation, then discussed the effect of the dam on the lake:

> " . . . where the waters of a navigable body are periodically raised and lowered by artificial means, the artificial fluctuations should be considered the same as a natural fluctuation with the rights of the public being the same in both situations. . . . " (*Id.,* 462 P.2d at 238.)

(Accord, *Goodrich v. McMillan,* 187 N.W. 368 (Mich. 1922) [dam owner acquired prescriptive right to overflow littoral lands and maintain lake level three feet above natural level]; *Hass v. McManus,* 126 N.W. 462 (Mich. 1910) [riparian owners have right to maintenance of existing dam-regulated levels]; *Smith v. Youmans,* 70 N.W. 1115 (Wis. 1897) [artificial outlet maintained for 20 years "became the natural outlet with all its legal incidents and consequences"; dam operators acquired prescriptive right to flood plaintiff's land to new high-water level]; *Village of Pewaukee v. Savoy, supra,* 79 N.W. 436.)

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supra, 164 Cal. 24 (public's right to fish, hunt over periodically submerged tidelands granted in fee to private owners); *Taggert v. Jaffrey,* 76 A. 123, 125 (N.H. 1910): "The stream had been changed in a manner to indicate that the alteration was permanent. There are prescriptive rights"; *State v. Malmquist,* 40 A.2d 534, 538 (Vt. 1945) (artificial, dam-established lake level "has become the natural level"; owner could not lower against objections of littoral landowners.)

Of course this theory works on behalf of upland landowners as well as the sovereign state. The appellate courts of this state have held a number of times the landowner may acquire a vested interest in a long-continued diversion of waters (*Clement v. State Reclamation Board, supra,* 35 Cal.2d 628; *Natural Soda Prod. Co. v. City of Los Angeles, supra,* 23 Cal.2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18) and may recover damages if the level of a lake is lowered against his long-established expectations. (*City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d at 472, cited in *Fogerty I, supra,* 29 Cal.3d at 248, fn. 5.)

C. Petitioners Had Ample Remedies Under State Law For Any Rights Lost By The Raising Of Dam Levels

Littoral owners whose lands are affected by an artificial raising or lowering of waters have ample remedies under state law. (*City of Los Angeles v. Aitkin, supra,* 10 Cal.App.2d 460.) However, if they fail to assert them in a timely manner, both state and private owners may become entitled to rely on the established artificial levels. (*Natural Soda Products v. City of Los Angeles, supra,* 23 Cal.2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18, cited in *Fogerty I, supra,* 29 Cal.3d at 248.)[7]

As petitioner Tahoe Shorezone Representation concedes, the right to object to the elevated waters of the lake

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7. See also 43 Ops.Cal.Atty.Gen. 291, 298 (1964) pointing out that "an artificially caused change in the water line of a lake or stream may come to be regarded as permanent," although the opinion goes on to state:

> "[I]t is possible that the artificial change would not result in a boundary change . . . if further changes in the artificially influenced waters could be enjoined, the practical effect would be to change the boundaries." (*Id.,* at 298-299.)

and the corresponding public uses up to the elevation of 6229.1 has long since been lost (TSR petition, 18-19). The Attorney General's opinion cited by petitioner bears this out in discussing the effect of the Truckee River Decree on rights of the littoral owners:

> "In our opinion, the right to an injunction is also now barred, even assuming that the acts of the federal officials in flooding littoral lands through operation of the dam, without the United States first having acquired rights to do so by condemnation, could have been enjoined when the flooding first occurred [citations omitted]. Since the littoral landowners have failed for more than 40 years to obtain injunctive relief, the equitable doctrine of laches would seem to bar the granting of such relief now. Irrespective of the applicability of any statute of limitations on such an action, it is a familiar principle of equity that 'unless a litigant can show that he acted with reasonable diligence in the assertion of his equitable rights, a court of equity will turn a deaf ear to his plea.' (*Williams v. Stilwell* (1933), 217 Cal. 487, 490; *Gillons v. Shell Co. of California* (9th Cir. 1936), 86 F.2d 600, 609-619)." (30 Ops.Cal.Atty.Gen. 262, 272 (1957).)

The same reasoning obviously applies as between littoral landowners and the State of California.

Obviously, littoral owners whose lands are affected by an artificial raising or lowering of waters have ample remedies under state law. They may seek injunctive relief, or they may seek compensation. (*City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d 460.) However, if they fail to do so in a timely manner, both state and private owners may become entitled to rely on the established artificial levels. (*Natural Soda Products Co. v. City of Los Angeles, supra,* 23 Cal. 2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18.)

The California court has accurately concluded, therefore, that the condition of the lake as it has existed since

the construction of a dam in 1870 should be utilized in determining the lake's high-water mark.[8]

2. THE ACQUISITION OF SOVEREIGN RIGHTS UNDER STATE LAW GOVERNING AMBULATORY WATER BOUNDARIES IS NOT RESTRICTED TO THE LOCATION OF THOSE BOUNDARIES IN 1850

Petitioners' contention that the trust cannot exist on lands to which the state did not acquire title at statehood fails to comprehend the concept that riparian boundaries are ambulatory in nature, and can rise or fall with water levels. Furthermore, this proposition was expressly disapproved as a matter of state law in *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal.3d 288, 299, fn. 11 (1982). The subsequent reversal of that case by this Court on other grounds in *Summa Corp. v. California* ex rel. *State Lands Comm.,* 466 U.S. 198 (1983) did not affect that holding.

In fact, this Court in *Summa* recognized the nature and extent of the state's public trust doctrine and indicated that in circumstances where the 1851 federal validating act controlling the transfer in question was not applicable, as in the instant case, a different result would follow:

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8. The court pointed out in *Fogerty I* that adoption of this method of fixing boundaries will make clarification of both private and public rights considerably easier in a state where virtually all of the lakes and rivers have been artificially regulated since the nineteenth century. It is no rebuttal to this application of state law to contend, as do petitioners Fogerty et al., that a 1957 study purported to fix a natural high waterline. (Petn., pp. 3-4, n. 1.) That study did not in fact or even purport to fix or establish in any way a natural high-water line of Lake Tahoe. It was a comprehensive water supply study of the lake which included an estimate of what the levels might have been after 1900 in the absence of the dam constructed at the lake's outlet (TR 3367 et seq.). Moreover, even the petitioners did not urge the elevation they suggest here in the proceedings below.

"The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. *Pollard's Lessee v. Hagan,* 3 How. 212 (1845). Thus, an ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State. *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 15-16 (1935). But the Court in *Borax* recognized that a different result would follow if the private lands had been patented under the 1851 Act. *Id.,* at 19. Patents confirmed under the authority of the 1851 Act were issued 'pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had not passed to the State.' *Id.* at 21. See also *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 375 (1977); *Knight v. United States Land Assn.,* 142 U.S. 161 (1891)." (466 U.S. at 205.)

Petitioners look to *Brewer-Elliott Oil and Gas Co. v. United States,* 260 U.S. 77 (1922) to support their position that the public trust easement cannot move up the lakeshore as the waters rise. (*Fogerty,* petn. at p. 15.) More to the point, this Court stated in the next sentence to that quoted by petitioners:

"It is true that, where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the public land laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee. *Thus the right of the riparian owner under such grant may be limited by the law of the State either to high or low water mark or extended to the middle of the stream. Packer v. Bird,* 137 U.S. 661, 669." (*Brewer-Elliot Oil and Gas Co. v. United States, supra,* 260 U.S. at 88; emphasis added.)

A water boundary is an ambulatory boundary. Its movement, as between the state and private upland owners, is determined by state law, and has been ever since *Martin v. Waddell, supra,* 41 U.S. (16 Pet.) 367, if not before. It does not present a federal question. (E.g., *Matcha v. Mattox, supra,* 711 S.W.2d 95 (Texas, 1986), cert. den., 107 S.Ct. 1911.)

3. PETITIONERS, HAVING FAILED TO ALLEGE ANY DENIAL OF ECONOMIC USE OF THEIR PROPERTY, DO NOT RAISE A FEDERAL QUESTION COGNIZABLE BY THIS COURT.

Petitioners have urged that the existence of a public trust on privately held property between high and low-water imposes invalid restrictions on their use of such property. Assuming for purposes of argument, that a state court's declaration of common law can effect a taking,[9] their complaint fails to assert such a claim.

The possible exercise of the public trust on navigable waters is no more a taking than is the proper exercise of the navigational servitude. It is, " . . . not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." (*United States v. Rands,* 389 U.S. 121, 123 (1967); accord *United States v. Cherokee Nation of Oklahoma,* 107 S.Ct. 1487, 94 L.Ed.2d 704 (1987).)

Setting public trust considerations aside, the interest of a littoral owner between high and low-water is a quali-

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9. See *Gt. Northern Ry. v. Sunburst Co.,* 287 U.S. 358, 364-365 (1932); *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 450 (1924).

fied one to say the least. It is subject both to state and federal navigational servitudes to high-water. (See *City of Berkeley v. Superior Court, supra,* 26 Cal.3d at 545, cert. den. 449 U.S. 840; *Colberg v. State of California, supra,* 67 Cal.2d 408, 416, cert. den. 390 U.S. 949; *United States v. Cherokee Nation of Oklahoma, supra,* 107 S.Ct. 1487; *United States v. Rands, supra,* 389 U.S. 121, 123; *United States v. Willow River Co.,* 324 U.S. 499, 509 (1944); see also *Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970).)[10] Moreover, consistent with the California rule, the federal navigational servitude extends to the artificially-raised high-water mark.[11] (*Swanson v. United States, supra,* 789 F.2d 1368.) And at Lake Tahoe the littoral interest is subject to periodic inundation up to an elevation above that set by the California Court of Appeal whenever the federally-appointed watermaster deems it appropriate. (See *Fogerty II, supra,* 187 Cal.App.3d at 224, 231, 235; see also 30 Ops.Cal.Atty.Gen. 262 (1957).)

The existence of a public trust on such lands does not deprive petitioners of economic use of the lands between high and low-water. Upland owners have taken a fee subject to the retained public trust interest. The purchaser of lands subject to the public trust ". . . may use the prop-

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10. The New Jersey Supreme Court has held that even privately owned dry sand beaches controlled by a quasi-public entity are subject to public right of access as reasonably necessary. (*Matthews v. Bay Head Imp. Assn.,* 471 A.2d 355 (N.J. 1984), cert. den. 469 U.S. 821.)

11. A federal district court recently affirmed applicability of the Corps of Engineers' jurisdiction over artificially-created wetlands under the Clean Water Act, as well, holding such lands could be "navigable waters of the United States." (*United States v. Akers,* 651 F.Supp. 320 (E.D. Cal. 1987).)

erty as he sees fit, subject to the power of the state to abate any nuisance he may create thereon, and to remove any purpresture he may erect thereon." Furthermore, where improvements have been constructed on such lands the state may not exercise the trust without compensating the patentee. (*People v. California Fish Co., supra,* 166 Cal. at 599.)

Uses consistent with the public trust have been held, under prior decisions of the California courts, to include clearly economic and valuable ones, including mineral exploration (*Boone v. Kingsbury, supra,* 206 Cal. at 181-184) and the construction of docks, wharves, motels, restaurants, shopping complexes and parking areas. (*Martin v. Smith, supra,* 184 Cal.App.2d 571.) Waterfront docks, resorts and buildings line the shores of San Francisco Bay, Los Angeles and San Diego harbors in mute reproach to petitioners' dismal characterization of trust restraints. Petitioners have been unable to cite a single instance in which littoral landowners have been denied use of trust land held by them in fee, nor have they found an instance in which the state has exercised the trust and re-entered for the purpose of furthering the trust.[12]

Petitioners cannot be heard to complain of being precluded from activities in which they have not even attempted to engage. They are entirely free to pursue their reasonable investment expectations by developing plans and going through the same processes any other landowners must pursue. Indeed, the existence of the public

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12. Even if it did so, of course, it would be required to compensate the owner for any lawful improvements. (*Illinois Central Railroad Co. v. Illinois, supra,* 146 U.S. at 455; *People v. California Fish Co., supra,* 166 Cal. at 599; California Public Resources Code section 6312.)

trust, while possibly inhibitive of fill or the construction of incompatible improvements, does not, absent an implementing statute or ordinance, even require petitioners to obtain the affirmative approval of anyone. (*Lyon, supra,* 29 Cal.3d at 232; *Fogerty I, supra,* 29 Cal.3d at 249.)

Indeed, before reaching some hypothetical public trust barrier, would-be developers of Lake Tahoe's shoreline must first seek the approvals of the U.S. Army Corps of Engineers and the regional and local planning agencies. The record indicates that the applicable land use regulations of these agencies would not permit any development in the shorezone (to an elevation above the high water mark in question) except for piers and other navigational facilities which are also deemed consistent with the public trust (TR 2708, 2719 et seq.; 2740 et seq.; 3030 et seq.; 3148).

Thus, petitioners' allegations that the mere existence of the public trust along the shores of Lake Tahoe below the high-water mark amounts to an unconstitutional taking is unsupported by any facts. They do not present this Court with a basis to judge whether their interests have been adversely affected, reasonably or not. Clearly such bald allegations are not ripe for consideration. (See *MacDonald Sommer & Frates v. Yolo County, supra,* 106 S.Ct. 2561; *Williamson County Regional Planning Commission v. Hamilton Bank, supra,* 473 U.S. 172.)[13]

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13. The question of the appropriateness of the damages remedy for regulations which deny a landowner all use of his land as recently considered and explained by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra,* 107 S.Ct. 2378, has not been, and cannot be, raised in this case. Nor would it be appropriate in any

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This case was not ripe for review when petitioners asked this court to review *Fogerty I* in 1981 (cert. den., 454 U.S. 865). It is no more ready now that an intermediate appellate court has determined the location of Lake Tahoe's high-water mark at its current level. (See *Ariyoshi v. Robinson, supra,* 106 S.Ct. 3269.)

CONCLUSION

In 1893 this Court observed that the states are free to adopt their own rules of property, and that generalizations should be undertaken with great caution. (*Shively v. Bowlby, supra,* 152 U.S. at 26.)

As then-Justice Rehnquist stated in *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363:

> "Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' *Davies Warehouse v. Bowles,* 321 U.S. 144, 155 (1944). This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of *Swift v. Tyson,* 16 Pet. 1 (1842), an exception was carved out for the local law of real property. *Id.,* at 18. See *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 591 (1973).

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event absent any showing of state implementation of the challenged decision which denied petitioners "all use" of their property. (*Id.,* at 2388-2389.)

"This principle applies to the banks and shores of waterways, and we have consistently so held." (*Id.*, at 378-379.)

Long ago, this Court wisely held that:

"[I]t is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determined to be nonexistent." (*Fox River Co. v. R.R. Comm.*, 274 U.S. 651, 657 (1927).)

For these reasons, the petitions for a writ of certiorari should be denied.

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Respectfully submitted,

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